NO. 207.

United States of America.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY, a corporation; ANACONDA MINING COMPANY, a corporation; ANACONDA COPPER COMPANY, a corporation; ANACONDA COPPER MINING COMPANY, a corporation; MARGARET P. DALY, MARGARET P. DALY as executrix of the estate of Marcus Daly, deceased; JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, and DANIEL J. HENNESSY,
Appellees.

In Equity.

BRIEF AND ARGUMENT FOR APPELLANT.

P. C. KNOX, Attorney General,
M. C. BURCH, Special Assistant Att'y General,
CARL RASCH, U. S. District Attorney,
FRED A. MAYNARD, Special Assistant. U. S. Att'y,
Solicitors for Complainant.

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Appellees.

In Equity.

STATEMENT OF FACTS.

This case is here on an appeal from a final decree entered by the United States Circuit Court, for the District of Montana, dismissing complainant's bill of complaint. The

case was heard on general demurrers to the bill, filed by Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, and John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, defendants. No service could be had on the defendants Bitter Root Development Company, Anaconda Mining Company, and Anaconda Copper Mining Company, as they have no officers or offices and are not now in existence.

The facts of this case, as admitted by the demurrers, are substantially as follows:

On the first day of April, 1890, the complainant and appellant was the owner in fee of certain lands in the State of Montana, particularly described in the bill. These lands are situated in the Bitter Root Valley, through which the Bitter Root River and its tributaries run, and embrace a territory of about thirty miles in length, by six miles in width, and on the day and year last aforesaid, on this vast tract, there were then growing and standing forests of pine, fir and other timber fit to manufacture into lumber, for mining, commercial and all other purposes for which lumber is used. That said forests were of great value, to-wit, of the value of two million dollars; that these forests and the land upon which they were growing and standing, were the absolute property of the United States and formed a part of its public domain; that twelve years thereafter, namely, the 26th day of February, 1903, the day

on which the bill of complaint in this case was filed, said land had for the most part been stripped of said timber and, except very small portions thereof, had been so denuded without license, authority or permission of the United States, and in violation of its laws, both civil and criminal, and in consequence of said spoliation the complainant had lost millions of dollars worth of its property. The facts and circumstances attending this spoliation as set forth in the bill, and admitted by the defendants, are in substance these:

Marcus Daly, now dead, but on the first day of January, 1890, a citizen of the State of Montana, well knowing of the location of these lands, their accessibility and the great value of the timber then growing and standing thereon, did on that day and date determine that he would convert and appropriate to his own use all of the merchantable timber growing and standing thereon, without paying for said timber or obtaining any right or authority from the United States, except as hereafter stated. That in order to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually and to better deceive the public and the local officers and agents of complainant, he determined that he would organize a corporation under the laws of the State of Montana, and for that purpose Daly called to his aid and assistance the defendants Toole, Dixon, Scallon and Hennessy and others named in the bill, and by conspiracy and confederation with them, and in consequence of such fraudulent purpose, on

the 12th day of August, 1890, they organized a corporation known as the Bitter Root Development Company, named as one of the defendants herein. Its capital stock was fixed at the sum of three hundred thousand dollars, divided into one hundred thousand shares of the par value of three dollars per share. All of said incorporators, except Daly, had but a nominal interest in this corporation, but acted as his agents, and some of them as his attorneys, and as such conspired with him as to the manner and means by which his said purpose to denude the lands of the complainant could be best carried out, and all of the shares held by them were subscribed for the use of and controlled by, said Daly.

That not only in the organization of said corporation did said defendants above named aid and assist said Daly, but in many other ways up to the time of his death, which occurred ten years thereafter, they engaged with him in the work of spoilation in pursuance of said conspiracy, and they participated with said Daly in the profits thereof, but t owhat extent is unknown to the complainant.

That at once on the organization of the said corporation said Daly, under the name of said corporation, commenced the work of cutting and carrying away from said lands the trees and timber then growing and standing thereon. In the year 1892 a large saw mill was erected at the town of Hamilton on the Bitter Root River, and the work of cutting, hauling, transporting to the river and thence to said mill, and manufacturing the same into lumber, was prosecuted with great and unremitting industry for sev-

eral years thereafter to the great profit and advantage of said Daly and his associates and to the great loss of complainant. That in pursuance of said conspiracy, and for the purpose of carrying out the same, and for the better concealing their depredations, said Daly did apply for and obtain from the complainant, licenses to cut timber upon certain small portions of the tracts of land described in the bill, and under cover of such permits they not only cut and carried away and manufactured into lumber the timber growing upon the lands included in such licenses, but also wilfully and fraudulently entered upon large tracts of land adjacent thereto, under claim that they were permitted to do so by the licenses which they had received, but in fact they at the time well knew that such licenses gave them no right or authority to enter thereon, and on such lands they cut, carried away and manufacutred into lumber the timber standing and growing thereon, and afterwards sold the same to persons and corporations to the complainant unknown, and known only to said Marcus Daly and his fellow conspirators and agents, and said Daly and his fellow conspirators appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom besides said Daly said proceeds were paid, in what proportion, in what way and at what particular time, it is impossible for the complainant to state, as all books of account, of every kind and character, were then and are now in their possession, under their control or with their assigns.

That further, in pursuance of said conspiracy and in the

execution thereof, and to more effectually conceal the same from the complainant, its officers and agents, said Daly, under the corporate name of the Bitter Root Development Company, engaged the services of a large number of men, falsely representing to them that he had the authority from the United States to cut the growing timber on said tracts of land, and made contracts with them, by the terms of which they were to be paid a certain amount for logs delivered at the river bank, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided Daly in his unlawful acts and enable him to successfully prosecute the same.

That further in pursuance of said conspiracy and in execution thereof, Daly, under the corporate name of the defendant Bitter Root Development Company, entered into other contracts or agreements with Kendall Brothers, Harper Brothers, G. L. & H. Shook, William Toole, Andrew Kennedy, D. B. Bean, John Ailport, and other persons unknown, by the terms of which they were to be paid specified prices, per thousand feet board measure, for logs delivered at the saw mill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to the United Sates and was to be unlawfully cut and removed; that said contractors, so called, acting for Daly under the name of the Bitter Root Development Company, during the year 1891, and for several years next there-

after, wilfully tre-passed upon the lands named and described in the bill and cut therefrom millions of feet of logs, hauled them to the river and thence to the mill, where they were converted into lumber and sold to the public, and a large part of the proceeds appropriated by Daly and the balance by his associates in said conspiracy, but just how much and in what proportion, for the reasons above stated, it is impossible to more particularly state.

Further in execution of such conspiracy, for the purpose of concealing such illegal acts, and so complicating and confusing the situation as to make detection and proof of the same difficult, if not impossible, said Daly organized other corporations; on or about the 14th day of January, 1891, a corporation known as the Anaconda Mining Company, with a capital stock of twelve million five hundred thousand dollars was organized. In less than one year thereafter, namely, on the 5th day of December, 1891, the capital stock of said corporation was increased to twenty five million dollars. That at such last named meeting, no one of the incorporators or trustees that were named at the time of its incorporation a few months before, had any substantial interest therein, and a few days later, namely on the 31st day of December, another meeting was held at which it was voted to extend the terms of existence of said corporation for forty years from the date of its original incorporation. At that meeting it appeared that Daly, in his own person or as trustee or as a proxy, controlled over seven hundred thousand shares of the capital

stock, and in less than six months thereafter the capital stock was reduced from twenty five million dollars to one million and the shares from one million to forty thousand

In furtherance of the conspiracy aforesaid the said Daly on the 27th day of April, 1894, for and in consideration of one dollar, obtained a conveyance to himself of all of the property of said Bitter Root Development Company, and four days thereafter, namely, on the first day of May, 1894, said Daly deeded the same property to another corporation, the above named defendant Anaconda Mining Company, for the expressed consideration of $1,442,379.46 That said Daly did in fact receive the amount named in said deed, the whole thereof being directly the result of the spoilation of the lands of the complainant, and in truth and in fact belonged to complainant. All of this consideration, however, was not in cash, but a portion of the same was taken in stock in said Anaconda Mining Company, but just how much he received in cash, and how much was carried over and was taken in stock of said company, it is impossible for the complainant to precisely state.

Further in carrying out said conspiracy certain of the agents of Daly named in the bill, on the 6th day of June, 1895, organized the Anaconda Copper Company with an authorized capital stock of thirty million dollars, and nine days thereafter the same persons named as incorporators of the last named corporation, organized the defendant corporation, the Anaconda Copper Mining Company, with the same amount of capital stock, namely thirty million dollars.

Further, in execution of said conspiracy, for the purpose of still more complicating the situation, said Daly, with his agents, within one year and twenty nine days after having transferred his property to the Anaconda Mining Company, conveyed the same identical property to the defendant Anaconda Copper Mining Company for a consideration of one dollar.

The bill further charges that all of these conveyances were made, in the main, in furtherance of said conspiracy and in pursuance of the purpose to so complicate the situation as to make detection difficult if not impossible, and that Daly, during the entire ten years, namely from the organization of the Bitter Root Development Company on the 12th day of August, 1890, under the names of these several different incorporations, did carry on this work of spoliation, he continued to use the same means and the same mill at Hamilton and the officers, directors and stockholders of each of said corporations knew of this illegal work. That all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit, but just how much was carried over into said corporations and how much was divided previous to the deed of conveyance to the defendant corporation, the Anaconda Copper Mining Company; how much of the timber of the complaiannt was converted by said last named corporation after the death of said Daly and how

much of the proceeds thereof was appropriated by Daly and his associates, and said company, it is impossible for the complainant with the means at hand, to state.

That by reason of such spoliation, continued and carried on during a period of about ten years, the complainant, the United States of America, has lost property of great value, to-wit, of the value of two million dollars. That Daly and the other defendants named in said bill, occasioned this loss by wilfully trespassing upon said lands of the complainant, and without its consent, and in violation of its laws, both civil and criminal, appropriated to their use the trees and timber growing thereon. That they had during all of this period and now have possession of the saw mill, at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them, but by reason of the frauds practised by said Daly and his assistants as aforesaid and their acts performed for the express purpose of concealing the facts of the case, by means of the formation and dissolving and reformation of corporations, and by reason of their having possession of all books of account, it is impossible to set forth to a greater extent the details of said conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when or to whom the logs, when manufactured into lumber, were sold, or just when and by whom the proceeds of the same were obtained and divided.

It further appears in the bill that at the time that these

trespasses were committed, the territory on which the same took place was but sparsely settled; was thousands of miles away from the seat of government, and it was impossible, with the means at hand, for the complainant to properly patrol and protect its domain from the wilful trespasses of the defendants, and that the government of the United States used such care in the protection of the same as it had means to do. That the agents employed by the government were mislead by the defendants' assertion of ownership and by their claim of right to cut under licenses that had been granted by the United States, and that said frauds and trespasses which have so resulted in the denuding of the lands of the United States and in the depriving it of property of the value of several million of dollars, were not discovered in their entirety until a comparatively short time ago.

It is further averred in the bill that on the discovery of said frauds the United States commenced several actions at law to recover the value of the timber so taken by the defendants and that the same were pending at the time the bill was filed, but that by reason of the frauds and conspiracy above stated, and the complications which have resulted therefrom, and for a number of other reasons hereafter stated, said action afforded the complainant no plain, adequate and complete remedy at law and the bill was filed, as the officers of the Department of Justice became satisfied that the only forum in which the United States could obtain a complete remedy was the court of

equity, where matters of this kind are properly cognizable and relievable.

It further appears in the bill of complaint that at the time of his death Mr. Daly was a citizen of the State of Montana and was a resident of the county of Deer Lodge in said state and district, and left an estate worth about twelve million dollars, consisting of real and personal property located in said county and state and elsewhere, and it is expressly charged therein that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands named in the bill and converting the timber growing thereon to his own use and benefit.

That he made and published his last will and testament wherein the defendant Margaret P. Daly is named executrix, which was admitted to probate and on the 15th day of February, 1901, letters of administration were duly issued by the proper court to her, and that she duly qualified and entered upon the discharge of her duties as executrix, and that under and by virtue of the terms of said will, said Margaret P. Daly is now the owner in her own name of a large portion of said estate.

The prayers of the bill are as follows:

First. That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for

the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains, and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

Third. That each of the defendants may make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under direction and decree of this honorable court, of all the dealings and transactions between your orator and the defendants. That on such an accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the saw mill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits and advantages which the said defendants, or either of them, or the estate of said Marcus Daly have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

Fifth. That the said defendants and each of them discover and set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from each and every of said sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

Sixth. That the defendants, and each of them, may set forth a list of schedule and description of all books of account of every kind and character, and of all deeds, docu-

ments, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which are now, or ever were, in their or either of their possession or power, and may deposit the same with the clerk of this court, or with the standing master in chancery thereof for the purpose of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

The general demurrers filed in behalf of Margaret P. Daly, Margaret P. Daly as executrix of the last will and

testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, assign substantially the same grounds for demurrer, which can be summarized as follows:

That the bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that complainant has a full, complete and adequate remedy at law for the recovery of damages for the alleged wrongs of defendants, and also a full, complete and adequate remedy for any discovery necessary or practicable by any proceedings in such action at law.

That the complainant is not entitled to any discovery herein, as the bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States, and for that reason the defendants are not compelled to make any discovery, to answer said bill or to produce any papers, etc., relating to the matters and things stated in said bill, because to do so might subject or tend to subject them to a criminal prosecution or accusation or to a penalty or forfeiture, and for the reason that some of the defendants were attorneys, and a discovery might compel them to violate professional confidence not allowed by law to be disclosed except under certain conditions and restrictions,

and for the further reason that a discovery in this suit is not sought in aid of any action at law.

Because the bill is so general, uncertain and indefinite that it states no equitable ground for relief or discovery, and in substance it is alleged that the bill does not show the acts of the defendants by which the complainant was deceived, misled or injured.

Because the bill shows upon its face that the complainant has been guilty of laches.

Because the actions at law are not described, nor the parties thereto named, nor is it alleged that these defendant or any of them are parties to such alleged actions at law or any of them.

Because the bill admits that the defendants had licenses to cut timber from some of the lands described in the bill, but does not describe such permitted or licensed lands or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands, although knowledge of such licenses or permits was within the knowledge of complanant.

The issue presented by the filing of these general demurrers came on to be heard before the United States Circuit Court, for the District of Montana, in equity, Judge Knowles presiding, and afterwards, on the 26th day of February, 1904, the court announced that these demurrers were sustained. No opinion was filed and no reasons assigned for the ruling other than that, in its opinion, the complainant was not entitled to a discovery. A few days

later, on the 4th day of March, the complainant refusing to amend its bill, a final decree was passed, dismissing the bill of complaint, and an appeal was at once taken to this court.

ASSIGNMENTS OF ERROR.

The complainant, the United States of America, assigns as grounds of error the following:

I.

The court erred in sustaning the general demurrers to the bill of complaint.

II.

The court erred in not holding that the bill of complaint sets forth sufficient facts and circumstances to invoke the aid of equity.

III.

The court erred in entering a final decree dismissing complainant's bill of complaint.

IV.

The court erred in not overruling said general demurrers, and in not ordering the defendants to answer the complainant's bill of complaint.

V.

The court erred in not holding that the bill shows upon

its face that the complainant has no plain, adequate and complete remedy at law.

VI.

The court erred in not holding that the bill shows on its face that the only forum in which the complainant can have a full, adequate and complete remedy is in a court of equity.

VII.

The court erred in not overruling each of the following grounds of Demurrer:

That said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete and adequate remedy at law, by action at law, for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate and complete remedy for any discovery necessary or practicable by proceedings in such action at law.

That the complainant is not entitled to any discovery herein because:

(1). The bill shows upon its face that the complainant has a full, complete and adequate remedy at law, and is therefore not entitled to any discovery.

(2). That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore de-

fendants herein are not compelled to give any discovery herein, or to answer said bill, or to produce any papers, books, documents or accounts relating to the matters and things stated in said bill, because to do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3). The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4). The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants or any of them, are parties to, or defendants in, any action at law relating to the matters set forth in the bill.

The bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the deendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how

said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from the complainant, nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere, loose, general and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled or injured by any of the defendants.

The bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled, instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want whereof, in relation to the matters stated in the bill.

Said bill is uncertain and insufficient:

(1). As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant an yfacts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2). It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alleged actions at law or any of them.

(3). The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its

agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed land, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4). Said bill is in many other respects uncertain, informal and insufficient.

ARGUMENT.

The rule is settled, that a bill is not subject to a general demurrer if it contains any matters, properly pleaded, which constitutes grounds for equitable relief or discovery, requiring an answer or plea.

It is a fundamental rule in equity pleading that if any part of the bill is good and entitled the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained.

In Pacific R. R. of Mo. vs. Missouri Pacific Ry., 111 U. S. 505-520, it is said: "The demurrers in this case are to the whole bill. If any part of the bill is good the demurrer fails. The charges of fraud in the bill, which are admitted by the demurrers, for present purposes are suf-

ficient to warrant the discovery and relief based on such charges."

Heath v. Ry. Co., 8 Blatchf. 407.
Edwards v. Bay State, etc. Co., 91 Fed. 946.
1 Daniels Chancery Practice, 605.
Wright v. Dame, 1 Met. 241.
Conant v. Warren, 6 Gray 562.
Bay State Iron Co. v. Goodall, 39 N. H. 236.
Burns v. Hobbs, 29 Me. 277.
Livingston v. Story, 9 Pet. 652-659.
Stewart v. Masterson, 131 U. S. 151-158.

The sole question, in the present situation of the case, therefore, is whether the defendants should be required to answer.

As the United States has suffered a loss of many hundreds of thousands of dollars at the hands of the defendants, it must be conceded that it is authorized to bring an action of some kind to recover for the same. The sole question is as to the form of the action.

The complainant claims that the facts and circumstances set forth in its bill of complaint show that the remedy at law is utterly inadequate, and that the only forum in which the facts and circumstances can be established and all of the necessary remedies applied, is in a court of equity.

The defendants, on the other hand, insist that the bill shows that the complainant has a full, complete and ade-

quate remedy at law for the recovery of damages for the alleged wrongs of the defendants, and that the law action is adequate for any discovery which may be required.

It seems to us that a bare reading of the bill is sufficient to convince the judicial mind that the complainant is right and the defendants are wrong, and that no review of the authorities is necessary.

The great amount involved, and the conclusion reached by us that the gigantic frauds set forth in the bill must forever remain unearthed if we cannot have the aid of equity and its processes, is our apology for the critical examination of the authorities which we have made, and which we set forth in the pages of this brief.

At the outset of this discussion we recognize the rule which holds "that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a *plain, adequate and complete remedy* without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." Our contention is that this rule has no application to the case presented by the bill now under consideration, and that the true rule applicable to it is as follows:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the

mode of obtaining it, is as efficient as the remedy that equity would confer under the same circumstances."

Kilbourn v. Sunderland, 130 U. S. p. 514.
11 Rose's Notes, p. 753.

In Boyce's Exrs. v. Grundy, 3 Pet. 215, the Supreme Court says:

"This court has been often called upon to consider the sixteenth section of the Judicial Act of 1789. and as often, enther expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate or, in other words, as practical and as efficient to the needs of justice and its prompt administration as the remedy in equity."

Payne v. Hook, 7 Wall. 430.
Oelrichs v. Spain, 15 Wall. 228.
Tyler v. Savage, 143 U. S. 95.
Pierpont v. Fowle, Fed. cases 11152.
Foster v. Swasey, Fed. cases 4984.
U. S. v. Myers, Fed. cases 15844.
Spring v. Domestic S. M. Co., 13 Fed. 449.
Gunn v. Brinkley Car, Etc. Co., 66 Fed. 384.
Society of Shakers v. Watson, 68 Fed. 738.
Nashville, Etc. Ry. v. McConnell, 82 Fed. 70.
Hayden v. Thompson, 71 Fed. 63.

Cockrill v. Cooper, 86 Fed. 14.
Alger v. Anderson, 92 Fed. 709.
See Vol. 3, Rose's Notes, pages 49, 50, 51, 52, 53.

It is also an established rule that there are a number of subjects over which courts of law and equity have a concurrent jurisdiction. Notwithstanding the provision of Section 723 of the Revised Statutes which prohibits suits in equity in any case where a plain, adequate and complete remedy may be had at law, there remains a limited range of cases in which the jurisdiction of equity continues to be exercised concurrently for the reason that the remedy at law, although existing, seems less practicable and less efficient to the ends of justice and its prompt administration than the remedy in equity.

In Root v. Ry. Co., 105 U. S. 189, Judge Matthews, in speaking for the court, in his opinion is careful to say that: "Grounds for equitable relief may arise, other than by way of injunction, where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in the legal tribunal difficult, inadequate and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground for exception from the general rule."

The foregoing principles and authorities have been cited by us to sustain our contention that if the case presented by the bill makes out as counsel for defendants claim, simply a gigantic case of trespass in which damages are sought, that the facts and circumstances are such that the aid of equity can be invoked on the sole ground that it is the most efficient remedy, and that the action at law, by reason of its inefficiency is totally inadequate. Here we have a series of trespasses extending over a period of ten years, committed on a territory some thirty miles in length by six miles in width, on land belonging to the United States, surveyed and unsurveyed, and committed by a great number of different persons and parties, under greatly varying circumstances, and who, on the surface, appear to have no relation to the real offenders in the case. The court can readily see that a vast number of separate and distinct law suits would be required, and that when considered alone, separate and apart from the entire transaction, it would be simply impossible for the government to make the necessary proof.

Judge Sanborn in Hayden v. Thompson, 71 Fed. 63, in speaking for the Circuit Court of Appeals for the Eighth Circuit, says: "Would these actions at law be as efficient, as practical and as prompt to attain the ends of justice as this suit in equity? The question is its own answer. * * * * The recovery of this fund by actions at law might, and probably would, involve taking each of these accounts of the assets and liabilities of

this bank as many times and before as many juries as there are shareholders in these accounts respectively. When it is considered how difficult it is for a judge and jury in a trial according to the strict rules of the common law, where the evidence must be presented to twelve men, who must hastily agree upon their verdict before they separate, to correctly take and state an account which contains numerous items, that for this reason the taking of mutual accounts has become an acknowledged ground of equity jurisdiction, (Gunn v. Manufacturing Co., 13 C. C. A., 529; 66 Fed. 382; Kirby v. Railroad Co., 120 U. S., 130, 134; 7 Sup. Ct. 430) and that the trial of the claims of this complainant in separate actions at law against these several shareholders involves the taking of so many accounts by so many juries, the conclusion is irresistible that the complainant's remedy at law is not only inadequate and inefficient to reach the ends of justice, but that it is impracticable and useless for that purpose. These long and complicated accounts can be properly taken and stated, and the just deductions can be drawn from them only in a court in which a careful, patient and extended examination of all the evidence can be made after it is submitted, by a mind trained in the science of accounting and familiar with the law which governs it."

Wyman v. Bowman, 127 Fed. p. 263.

IT IS, HOWEVER UNNECESSARY for us to rest our

claim that equity has jurisdiction on this narrow foundation.

There are many separate and distinct grounds upon which its aid can be invoked, which we shall now proceed to name in their order.

In Kennedy v. Creswell, 101 U. S., 641-645, Mr. Justice Bradley, in speaking for the court, says:

> "The point taken by the appellant that the court below sitting as a court of equity had no jurisdiction of the case, is not well taken. The authorities are abundant and well settled tha ta creditor of a deceased person has a right to go into a court of equity for a discovery of asse'ts and the payment of his debt. When there he will not be turned back to a court of law to establish the validity of his claim. The court being in rightful possession of the case for a discovery and account, will proceed to a final decree upon all the merits.
>
> Thompson v. Brown, 4 Johns (N. Y.) Ch. 619.
> 1 Story Eq. Jur. Sect. 546.
> 2 Williams Exrs. 1718, 1719.

The allegations of the bill in this case were sufficient to give the court jurisdiction and the accounts of the executor show that the complainant had reasonable cause for making those allegations. They went into the court for a discovery of assets and the object of the bill was attained by the admission of the executor that he had suf-

ficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect, and the result would be that a bill in equity could be defeated by proofs showing that there was good ground for filing it."

In Green's Admx. v. Creighton et al., 23 Howard 90, Mr. Justice Campbell, in delivering the opinion of the court at page 106, says :

> "The questions presented for inquiry in this suit are whether the subject of this suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control over it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees and that court exercises original control over them in favor of creditors, legatees and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity and obtained a decree for payment out of the personal estate without taking a general account of the testator's debts. (Attorney General v. Cornthwaite, 2 Cox 43; Adams Equity 257), and the existence of this jurisdiction has been acknowledged in this court and in several of the courts of chancery in the states."

Hagan v. Walker, 14 How. 29.

Pharis v. Leachman, 20 Ala. R. 663.

Spottswood v. Dandridge, 4 Munf. 289.

At page 108 this great Justice says:

"The duty of the administrator arises to pay the debts when their existence is discovered and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond, arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits and its power to adapt its decree to the substantial justice of the case."

See also Payne v. Hook, 7 Wall. 425.

Byers v. McAuley, 149 U. S. 608.

Fowle v. Lawrison's Exrs. 5 Pet. 495.

Hale v. Tyler, 115 Fed. 833.

Mr. Pomeroy, in his work on Equity Jurisprudence, Vol. 1, Section 156, says:

"One of the most important subjects to which the theory of trust has been extended is the administration of estates of deceased persons. The relation subsisting between executors and administrators on the one hand, and legatees, distributees and creditors on the other, has so many of the features and incidents of an expressed, active trust that it has been completely embraced within the equitable jurisdiction in England and also in the United States."

And then he goes on to say, what is obviously true,

namely, that at common law, although individual creditors might recover judgment of their respective demands, the legal procedure furnishes absolutely no means by which the rights and claims of all the parties in interest could be ascertained and ratably adjusted, the assets proportionably distributed and the estate finally settled, thus making a resort to a court of equity necessary for a proper administration of the assets.

In Beverly v. Rhodes, 86 Va. 416, it is said:

> "The first and principal question arises upon the demurrer to the bill. The appellant insists that the complainant's remedy was at law and that a court of equity has no jurisdiction of the case, but we do not concur in this view. That a single creditor at large of a deceased debtor may sue the personal representative in equity for an account of assets and the payment of his debt, is well settled.
>
> "The decree for account, however, whether the suit be brought for the plaintiff singly or on behalf of himself and other creditors (for it makes no difference) is for the benefit of all the creditors, and hence all may come in and prove their debt before the master, and have satisfaction of their demands equally with the plaintiff in the estate, for all are as parties. In this way a multiplicity of suits is avoided, the assets are marshalled and complete relief afforded. The jurisdiction of a court of equity in such cases is said by some of the authorities to be

> founded upon the necessity of taking accounts or compelling a discovery of assets, and because there is no adequate remedy at la.w By others, it is put upon the ground of a trust in the personal representative which it is the duty of the court of equity to enforce, but whatever may be the reason the jurisdiction is not only well established, but with us is practically exclusive."

We have now established, we think, that there are two grounds upon which we have the right to invoke the aid of equity in this case. First, because it is the more efficient remedy, and an action at law would be utterly inadequate; and Second, by reason of the original jurisdiction which courts of chancery have over executors and administrators, who are considered as trustees in favor of creditors, in reference to the proper execution of their trust.

The Third ground upon which we have the right to invoke the aid of equity is this: The bill shows that an accounting is necessary in order to ascertain just when and by whom the proceeds arising from the denuding of the complainant's forests by the defendants were received, and ascertain how much of the same is now in the possession of the Daly estate, how much appears in the Anaconda Copper Mining Company, and how much the individual defendants received. The governing rule may be stated as follows:

> "Equity has jurisdiction in settlement of accounts

where the dealings between the parties were numerous and the matters in dispute are so many that it is impracticable to take an account by the ordinary common law proceedings."

Mr. Chief Justice Marshall, in Fowle v. Lawrison's Exrs., 5 Pet., 495-503, says:

"In all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

In Fenno et al. v. Primrose et al., 116 Fed. 49 (1902), Judge Putnam, in deciding that equity has jurisdiction of a suit by a factor for a settlement of his account with his principal, where the dealings between the parties were numerous and the matters in dispute are so many that it is impracticable to take an account by the ordinary common law proceedings, says:

"If the questions are so involved as would appear in the declaration in the suit at law and in the allegations of complainant's bill, we have no question that an attempt by a jury to pass on the issues between the parties would result in a failure of justice, because it would be impracticable for a jury to do so correctly. The most that a jury could award would be a lump sum, derived from the general impressions remaining as a consequence of a trial covering, as this would, several weeks, and involving a

great multitude of items of all kinds. * * * Consequently, as the case now stands, it is impossible to do justice except on an accounting taken under the direction of a chancellor. Under such circumstances we think jurisdiction lies in equity. Mr. Justice Story, in Section 459 of his work on Equity Jurisprudence, apparently leaves one side a case like this at bar, and enumerates only certain well known grounds of jurisdiction in equity for taking accounts. Of course there is no doubt that, wherever the technical action of account lies at comon law, equity has concurrent jurisdiction. So, also, it has undoubtedly jurisdiction to take the accounts of a principal against an agent, a cestui que trust against a trustee, a consignor of goods against his factor, and in all cases where there is a fiduciary relation which entitiled the complainant in the bill to demand an account and a discovery of the items thereof. So, also, it is universally recognized *that equity has jurisdiction where there are mutual accounts of a complicated character. The case at bar, however, is not within those clear equities, as it is not by a principal against an agent, but by an agent against his principal; and the only ground on which jurisdiction is asserted is the complicated nature of the accounts, rendering it, as we have shown, impracticable to take them by the ordinary common law proceedings. In Mr. Bigelow's note to the section in Story's Equity Jurisprudence to which we have referred, he states

three grounds of equity jurisdiction, among which is where dealings are so complicated that they cannot be properly adjusted in a court of law. That under such circumstances the chancellor has jurisdiction is apparently thoroughly settled in England, and, as is well known, the federal courts act on the rules and principles which have long been recognized by the English equity courts, notwithstanding the general enactment in the statutes of the United States barring the exercise of equitable jurisdiction where there is an ample remedy at law. * * * The rule is laid down by Lord Redsdale in O'Connor v. Spaight, 1 Schoales & L. 305, 309, decided as early as 1804, to the effect that it is a sufficient ground for jurisdiction in equity that the accounts are too complicated to be taken at law. Also in Foley v. Hill, 2 H. L. Cas. 28, the rule is clearly recognized that the chancery courts will take accounts when complicated, independently of all other equities; and the cases, including the three which we have cited, were summed up to that effect by the court of appeal in Hill v. Railway Co., 12 Law. T. (N. S.) 63, in a case in which fundamental issues, aside from those of a mere accounting, were raised in litigation on a bill brought by a contractor against a railway company for the adjustment of liabilities growing out of a construction contract.

"In the United States the rule was sufficiently

stated by Mr. Chief Justice Marshall in Fowle v. Lawrison's Exr., 5 Pet. 495, 503, 8 L. Ed. 204, 207, as follows:

"'In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal; but in transactions not of this peculiar character great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction.'

"There is nothing in Root v. Railroad Co. 105 U. S. 189, 26 L. Ed. 975, which contravenes the rule thus recognized by the authorities to which we have referred."

In Kirby v. Lake Shore Ry., 120 U. S. 130, 134, Mr. Justice Harlan, in delivering the opinion of the court, says:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled

on each settlement. 1 Story Eq. Juris. Sec. 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot be doubted."

Says Mr. Justice Story, in Jones v. Lockhart, 2 Story Rep., p. 248:

"It is certainly true that in matters of account, courts of equity possess a concurrent jurisdiction in most, if not in all, cases with courts of law. In the present case, taking the statements of the bill to be true, which we must upon demurrer, it seems to us not only clear that it is a case fit for the interposition of a court of equity, but that it is emphatically so, and as one where a court of law could not render any justice in the matter, or, if any, it must be a very crippled and improper redress. It is indeed impossible to read the bill and not feel that some of the claims there set up, considering the complications and changes of interest of the parties, cannot be adequately examined, or properly disposed of, except in a court of equity."

The bill in this case discloses that *mutual accounts* are involved, for it is admitted that during the years when it is claimed that these trespasses were committed by the

defendants, that they did obtain from the government licenses and permits to cut timber on certain small portions or tracts mentioned in the bill, and that under cover of such permits and licenses, they not only cut and converted trees into lumber from lands included in such permits, but well knowing that such permits gave them no license or authority to enter upon other lands of your orator, they wilfully and fraudulently entered upon large tracts of land adjacent thereto, and cut, carried away and converted trees and timber thereon, and afterwards sold the lumber to persons and corporations to your orator unknown, and known only to the said defendants, and appropriated the proceeds thereof to their own use.

These permits are now in the possession of the defendants, or under their control. It is safe to assume that their books of account will show just how much timber was cut from lands covered by these permits or licenses, to whom the logs when manufactured into lumber were sold, and how much was obtained for the same, all of which information is exclusively in the possession of the defendants. If, on the production of the accounts and a thorough probing of the same before the master, it shall be found that the terms of the licenses and the conditions on which they were granted were fully complied with, the complainant will cheerfully credit the defendants with the same, and of course withdraw from its claim all tracts so covered by said licenses. But the burden of prov-

ing that the logs were taken and used in accordance with said licenses is upon the defendants.

> Northern Pacific R. R. Co. v. Lewis, 162 U. S. 366.
> U. S. v. Denver & R. G. R. R., 191 U. S. 84.

Even if this were not a case of *mutual* accounts, it is the settled law that a suit in equity for an accounting is proper, though the accounts are all on *one side*, if there are circumstances of great complication or difficulty in the way of adequate relief at law.

In Society of Shakers v. Watson, 37 U. S. App. 141, 15 C. C. A. 632, 68 Fed. 730, the court, in speaking of the jurisdiction of the courts of equity, where no adequate remedy at law exists, say:

> "A large branch of equity jurisdiction has always been concurrent with that of courts of law,—that is, has extended over the same general subjects as those taken cognizance of in actions at law; but where, from the nature of the circumstances, and on account of the inadequacies of its remedies, a court of law cannot afford the due and appropriate relief. In these cases there is an obligation of a legal character at the foundation of the suit, like the note in the present case, but there is some difficulty in the manner in which the obligation rests upon persons or property, or in the efficiency of the process belong-

ing to the court which makes the legal remedy inadequate."

Boyce's Exrs. v. Grundy, 3 Pet. 210.
Wylie v. Cox, 15 How. 416.
Barber v. Barber, 21 How. 582.

In Weymouth v. Boyer, 1 Ves. Jr. 424, Mr. Justice Buller, sitting for the Lord Chancellor, says:

"We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, we would not pronounce against the equity jurisdiction. This same principle has been laid down by Lord Bathurst.

"It would result from these considerations that this bill could be maintained if the note could be regarded as imposing a technically legal liability."

In Seymour v. Dock Company, 20 N. J. Eq. p. 396, the court says:

"The whole machinery of courts of equity is better adapted for the purpose of an account than any of the courts of common law, and in many cases, as has been said, when accounts are complicated, it would be impossible for courts of law to do entire justice between the parties. Courts of equity, in cases of complex accounts, take cognizance sometimes from the very necessity of the case, and through the incompetency of the courts of law at *nisi prius*, to examine it with the necessary accuracy.

On this ground alone, I think, the jurisdiction of the case must be maintained."

"A suit in equity for an accounting is proper where all the accounts are on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law."

Pomeroy, Eq. Jur., Vol. 3, 2nd Ed., Section 1421.
Blodgett v. Foster, 114 Mich., 688.

In appeal of Brush Electric Co., 114 Pa. St. at p. 574, the court makes use of the following language:

"Equity jurisdiction does not depend on the want of a common law remedy; for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties; hence, the exercise of chancery powers must often depend on the sound discretion of the court. So, a bill may be maintained solely on the ground that it is the most convenient remedy."

The same court, in Johnston v. Price, 172 Pa. St. 427, says:

"It is almost a work of supererogation to cite the perfectly familiar authorities, that in order to oust the equitable jurisdiction, the remedy, or supposed remedy at law must be full, adequate and complete, or that equitable jurisdiction does not depend on the want of a common law remedy, but may be sustained

on the ground that it is the most convenient remedy."

See also Mitchell v. Mfg. Co., 2 Story 648.

Tyler v. Savage, 143 U. S. 95.

Jones v. Bolles, 9 Wall. 364-369.

Russell v. Clark's Exrs., 7 Cranch, 69-89.

Ludlow v. Simon, 2 Caine's Cases in Equity, p. 38.

In Gunn v.Brinkley Car Works and Mfg. Co., 66 Fed. 382, it was held that where G. as surviving partner of the firm of G. & B. filed a bill for an accounting against the B. Manufacturing Co., and it appeared that the transactions between the firm and the B. Mfg. Co. involved a running account of more than 500 items, extending over more than six years, and further complicated by fraudulent entries and omissions by the deceased partner of the firm, who had been its manager, and also the manager of the B. Mfg. Co., it was held that an action at law for the balance due in a federal court, the federal court having no power to order a reference, would be an inadequate remedy, and that the case was within the jurisdiction of a court of equity. Judge Sanborn, in deciding the case for the Circuit Court of Appeals for the Eighth Circuit, says:

"But how can the appellant in this case obtain a correct and adequate accounting between this partnership and corporation in an action at law? In such an action for the balance due this account, the national courts have no power to order a reference to take and state the account, but the entire case must be tried to the jury. According to this bill, there is here a mu-

tual running account that extends over a period of more than six years; it involves more than five hundred items; it has been complicated and confused by the fraudulent entries and omissions of a faithless trustee; and, in our opinion, it would be next to impossible for a jury to carefully examine this account and reach a just result. That can only be done by a reference to a master or a hearing before a Chancellor in the method peculiar to a court of equity. In Kirby v. Railroad Co., 120 U. S. 130, 134, 7 Sup. Ct. 430, a case involving an account aggregating about $350,000, and running for a period less than ten months, Mr. Justice Harlan, in delivering the opinion of the Supreme Court, said (Judge Sanborn then quotes from the opinion of the court in that case, the paragraph we have herein set forth, and continues his opinion as follows:)

"To deprive a court of equity of jurisdiction, the remedy at law must be plain and adequate,—'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce's Ex'rs. v. Grundy, 3 Pet. 210, 215; Oelrichs v. Spain, 15 Wall., 211, 228; Preteca v. Land Grant Co. 4, U. S. App. 327, 330, 1 C. C. A. 607; 50 Fed. 674; Flotz v. Railway Company, 8 C. C. A. 635, 641; 60 Fed. 316, 322. An action at law in a federal court does not furnish such an adequate and efficient remedy for the

examination of a long, confused and complicated mutual account like that disclosed in this bill."

Judge Taft, sitting with Mr. Justice Harlan and Judge Lurton, in the Circuit Court of Appeals, Sixth Circuit, in the case of Bank of Kentucky v. Stone, 88 Fed. page 391, says:

> "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity on the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. And the application of the rule depends upon the circumstances of each case.' Boyce v. Grundy, 3 Pet. 210, 215; Sullivan v. Railroad Co., 94 U. S. 806. Watson v. Sutherland, 5 Wall. 79."

Practically the same language is used by Judge Bunn, in deciding the case of U. S. Life Ins. Co. v. Cable, 98 Fed. 761, sitting with Judge Woods, Circuit Judge and District Judge Allen, in the Circuit Court of Appeals of the Seventh Circuit.

It was said by Lord Eldon in Eyre v. Everett, 2 Russ. 381:

> "This court will not allow itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

The Fourth ground on which we are warranted in invoking the aid of equity is the avoidance of a multiplicity of suits. The bill shows that the acts committed by the defendants were not simply fugitive and temporary trespasses for which adequate compensation could be obtained in an action of law and the machinery of the law courts sufficient to reach all of the facts in the case, but their acts consisted in a destruction of the corpus of the estate, as almost the sole value of the lands described in the complaint was the value of the timber growing and standing thereon. Acts of destructive waste continued over a period of ten years, and under such complication of circumstances that no jury, in a law court, could possibly, with the means at hand, investigate the same so as to insure a correct result.

The bill shows that a vast number of actions at law would have to be commenced and tried before anything like the subject matter of this litigation could be covered. The persons who actually did the cutting are not the same, and the facts and circumstances surrounding the cutting by the several contractors, under whose supervision the cutting was actually done in the interest of the defendants, were entirely different, so that each suit would be separate and distinct, but there would be enough similarity in the facts and circumstances to prevent the jury in one case acting in the other; consequently the cases would have to be continued over the terms and the diffi-

culties would prove so great that the prosecution would have to be abandoned.

Under these circumstances, adopting the language used by Judge Severens in delivering the opinion of the court of appeals for the Sixth Circuit in Bailey v. Tillinghast, 99 Fed 801:

> "It is not necessary to rest the equitable jurisdiction over the case upon the fact that the receiver, as the representative of the creditors, is seeking to recover a trust fund, and that there is a complication of interest in the questions and matters involved, for we are clearly of the opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits, and for this latter purpose it is immaterial whether the suits to be avoided or proven are of a legal or an equitable character. The object is the same in either case, and the reason for the proceedings is the same."

In short, we have here practically the same situation as that presented in DeForrest v. Thompson, 40 Fed. 375. In that case Judge Jackson, in delivering the opinion of the court, in which Mr. Justice Harlan concurred, at page 378, said:

> "It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants and succeeded, the judgment would not conclude the

other defendants altogether; the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands * * may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all of the defendants before the court in one action, they can avoid a multiplicity of suits? I think they can.

1 Pom. Eq. Jur., Sections 245-269.
See also Garrison v. Ins. Co., 19 How. 312.
Story's Eq. Jur., Section 928.
West Point Iron Co., v. Reimert, 45 N. Y. 703.
Preteca v. Land Grant Co., 50 Fed. 676.

We have then in this case as ingredients to support the jurisdiction of equity the following:

1st. It is the most efficient remedy and no full, complete and adequate remedy is given by law.

2nd. The authority of equity over Mrs. Daly as an executrix.

3rd. The necessity of an accounting.

4th. The prevention of a multiplicity of suits.

We have also discovery, fraud, misrepresentation, waste and concealment, which we shall now proceed to treat briefly in their order.

Another ground upon which we invoke the aid of equity

is the absolute necessity of discovery. The bill in this case is filed for final relief, and to that end discovery from the defendants is necessary.

Counsel for the defendants, in the main, ignore this fact, and prepared their demurrers to the bill on the notion that it was a "bill for discovery," in the sense that its object was solely to obtain the evidence of the parties for use in the trial of legal actions.

If the bill of complaint states a cause for equitable relief, all the points raised by the defendants in their general demurrers relative to the discovery features thereof should be disregarded, for the rule is settled, if a bill for relief and discovery contains proper matter for the one and not for the other, the defendants should answer the proper and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. Stated in another way, the rule is as follows: Where the bill is filed for the purpose of obtaining final relief, and where discovery is only incidental to that end, there can be no demurrer to the discovery only, *for the simple reason that if the discovery be material in support of the relief, and the complainant be entitled to the relief, the defendants must answer.* Therefore, reference to rules of law relative to discovery are unnecessary, and we would refrain from such reference were it not for th fact that the court below sustained these demurrers and dismissed the bill on the sole ground that discovery would not lie. We therefore cite a few authorities simply to show how thoroughly established

the rule is that where a bill is filed for relief, a discovery may be required of the defendant as an incident thereto.

In this case, as in Tyler v. Savage, 143 U. S. 95, a recovery by the complainant depends largely on the information in the possession of the defendants, and which is sought by the bill, and therefore, in this case, as in that, discovery is one of the grounds for invoking the jurisdiction of equity.

Mr. Justice Story, in his work on Equity Jurisprudence at Section 67, says:

> "In cases of account, there seems to be a distinct ground upon which the jurisdiction of discovery should incidentally carry the jurisdiction for relief. In the first place, the remedy at law, in mose cases of this sort, is imperfect or inadequate. In the next place, where this objection does not occur, the discovery sought must then be obtained through the instrumentality of a master, or of some interlocutory order of the court, in which case it would seem strange that the court should grant some, and not proceed to full, relief. In the next place, in cases not falling under either of these predicaments, the compelling of the production of vouchers and documents would seem to belong to a court of equity, and to be a species of relief. And in the last place, where neither of the foregoing principles applies, there is great force in the ground of suppressing a multiplicity of suits, constituting as it does, a peculiar ground for the interference of equity."

The waiver by plaintiff in his bill, under equity rule No. 41, of an answer on oath, is not a waiver of his right to a full answer and for discovery from the defendant.

A bill for relief in a court of equity is, in fact, a bill for discovery, because it asks, or may ask, from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery and the right of the plaintiff to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title or apply an equitable remedy.

Bates Fed. Eq. Procedure, pp. 128-130.

See also Uhlmann v. Arnholt etc. Co., 41 Fed. 369,

Gamewell Fire Alarm Tel. Co., v. The Mayor, etc., 31 Fed. 312.

Colgate v. Campagnie, 23 Fed. 82.

Reed v. Cumberland, 36 N. J. Eq. 393.

Patterson v. Gaines, 6 How. 588.

Union Bank v. Gary, 5 Pet. 99.

Kittridge v. Claremount Bank, 1 Woodb. & M. 244; F. C. 7859.

Bartlett v. Gale, 4 Paige, 503.

In Kelley v. Boettcher, 85 Fed. 66, Judge Sanborn, in delivering the opinion of the court, says:

"A single question remains, and that must be answered in the affirmative. It is: Are the appellants entitled to a discovery, in aid of their title and suit,

of the facts within the knowledge of the appellees? It is true that the right to a discovery in courts of equity arose from the necessity of searching the conscience of the opposing party in order to ascertain facts, and obtain documents within his knowledge and control. It is true that the federal and state statutes now in force, which enable the complainant to obtain such an examination, have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Story Eq. Pl. sec. 311; Bisp. Eq. p. 15, Sec. 557; Pom. Eq. Jurisp. Sec. 201; Equity rules 40-44."

See also Lovell v. Galloway, 17 Beav. 1.

British Empire Shipping Co., v. Somes, 3 Kay & J. 433.

Shotwell's Exr. v. Smith, 20 N. J. Ch. 79.

Cannot v. McNabb, 49 Ala. 99.

Millsaps v. Pfeiffer, 44 Miss. 805.

But it is said by the defendants in their demurrer, that a discovery should not be granted, because true answers to the bill might subject them to a criminal prosecution or accusation or to a penalty of forfeiture. The answer to this objection is this: Mr. Daly is dead, and no charges are made against his executrix, Margaret P. Daly, which would subject her to criminal prosecution or accusation or to a

penalty or forfeiture. As to the defendant corporation, the Anaconda Copper Mining Company, it is settled that it is the duty of a corporation, if required to do so by the bill, to put in a full, true and complete answer, and to enable it to do so it must cause diligent examination to be made of all its papers and muniments in its possession, before answering.

To the point that since all the officers of a corporation are made competent witnesses by the federal statutes, there is no longer any reason for allowing a bill for discovery against a corporation. We answer: The corporation, as such, cannot be sworn and examined as a witness, and it is apparent that a discovery from this corporation is essential to attain the ends of justice. It possesses facts essential to a recovery, which complainant does not possess and cannot acquire except by obtaining a discovery through the answer of the corporation. The examination of its officers as witnesses can in no event be the exact equivalent of a discovery by the corporation itself through an answer made under its corporate seal.

See Bank v. Heilmen, 66 Fed. 184.
Pom. Eq. Jur. Section 199.
Evans v. Lancaster, 64 Fed. 626.
McClaskey v. Barr, 40 Fed. 559.

While in the words of Mr. Pomeroy "it is true that the defendant is never compelled to disclose facts which would

tend to incriminate himself, or to expose him to criminal punishment or prosecution or to pains and penalties, fines or forfeitures," this restriction to the right of discovery is subject to special limitations and exceptions necessary in order to promote the ends of justice.

The first exception to the rule is this: "A defendant is always compelled to disclose his frauds and fraudulent practices when such evidence is material to the plaintiff's case, even though the frauds might be sogreat as to expose the defendant to a prosecution for conspiracy, unless, perhaps, the indictment were actually pending."

Second, "where the liability to a penalty is barred by lapse of time, the defendant cannot escapt making a discovery."

Pom. Eq. Jur. Section 202.
Trinity House Corp. v. Burge, 2 Sim. 411.
Mitford on Eq. Pl. 195-197.
Divinal v. Smith, 25 Me. 379.
Skinner v. Judson, 8 Conn. 528.

The complete answer to the point raised that some of the defendants who aided Daly are his attorneys and therefore they are not compelled to answer under the discovery demanded, is this:

"An attorney, by reason of his professional relation, cannot refuse to make a discovery of the facts within his knowledge where it is unlawful for the client to ask and the solicitor to give, professional advice, and therefore

communications by which fraud is contrived or arranged betewen a lawyer and a client, are wholly excluded from the privilege and must be divulged."

Pom. Eq. Jur. Section 203.
See Peck v. Ashley, 12 Met. 482.

Where a penalty of forfeiture has at one time attached to the particular act of which a discovery is sought, and the penalty or forfeiture either by lapse of time or the death of the party or against whom it may be enforced or otherwise, the objection to the discovery is thereby removed, and the bill is no longer demurrable. Thus, for example, if the statute of limitation for a penalty or forfeiture has expired before the suit was brought, or pending the suit before the discovery is given, the defendant is bound to answer, for he is no longer within the reach of the perils against which the protection is allowed.

Story Eq. Pl. Section 598.
Corporation of Trinity House v. Burge, 2 Sim. 411.
Williams v. Farrington, 3 Bro. Ch. R., 38; Anon. 1, Vern. 60.

We are further authorized to invoke the aid of equity in this case by reason of the fraud, misrepresentation, and concealment practised by the defendants.

In Jones v. Rolles, 9 Wall. 364, it is laid down that equity has always jurisdiction of fraud, misrepresentation and concealment, and does not depend on discovery.

Mr. Justice Bradley, speaking for the court, said:

> "It is objected that a court of equity has no jurisdiction of the case, because the law affords a complete remedy in damages. The objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against the parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity."

The defendants say, in paragraph three of their demurrer, that the bill is so general, uncertain and indefinite that it states no equitable grounds for relief or discovery in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers were misled by any of the alleged acts of defendants, or how such acts complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; that it is not sufficiently averred how said frauds were perpetrated or how the alleged acts of fraud were committed; nor why the alleged frauds were not sooner discovered by complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from complainant; nor the diligence

with which the alleged frauds were investigated by complainant.

Also that the bill contains mere loose, general and indefinite allegations of fraud, and does not show the acts of defendants by which the complainant alleges that it was deceived, misled or injured by any acts of the defendants.

In answer to this objection we say: The facts of the case are set forth as fully as we are able to do so. Had the concealment alleged in the bill and the complications, gotten up for the express purpose of preventing knowledge, not been so great we would of course have more exact knowledge of the details of this fraud and could have stated them fully in the bill, but the objection of the defendants now under consideration is not good in law, as the rule is this:

"While every material fact to which plaintiff means to offer evidence, ought to be distinctly stated, a general statement of the matter is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to put them in as proofs."

Story Eq. Pl. Section 28.
1 Daniel Ch. Pr. Star P. 380.
Fletcher Eq. Pr. Section 106.
Chicot v. LeQuesne, 2 Ves. 318.
Clark v. Petriam, 2 Atk. 337.
Lloyd v. Brewster, 4 Paige 537.

In Dunham v. Eaton, 1 Bonds Reports 492, Fed. Cases 4150, the court say:

"The enforcement of the rigid rule of pleading, insisted on in support of this demurrer, would leave the complainants wholly without remedy, and altogether defeat the purpose of their bill. The very prayer of the bill is, that they may have a discovery from the defendants concerning the matters in regard to which the alleged uncertainty exists. If the allegations of the complainant's are true, they do not know, and have not the means of ascertaining these matters, except by a discovery from the defendants, it is very clear that they are without remedy, unless they can call on them for a discovery as prayed for in the supplemental bill. The facts about which they are required to answer are within their knowledge, and they cannot be taken by surprise in being called upon to answer. They certainly know whether they subscribed stock for the purpose alleged, to which company it was subscribed, how much of it was paid, and what is now due. And I am at a loss to perceive the hardship of requiring them to disclose these facts by their answers. If they, or any of them, are not indebted it is a good defense to the claim asserted against them; and if there is a just indebtedness on account of their subscription, the complainants have an equitable claim for it. True, the defendants, if they prefer that course, may decline to answer, and allow a decree pro

confesso to pass against them. In that event, the court, on application, would direct the master to take and report a statement of the indebtedness of each of the defendants. And, if it should be necessary for this purpose, that the master should examine them touching their indebtedness, one of the rules of chancery practice of this court confers ample authority to do so. The 77th rule is referred to, which provides, among other things, in case of reference to a master, that 'he shall have full authority to examine the parties to the case touching all matters contained in the reference, and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto.'"

The same strictness is not required in a bill of equity as in a declaration of common law, but it may perhaps be correctly affirmed that certainty to a common intent is the most that the rules of equity ordinarily require in pleadings for any purpose. Even in criminal pleading, where the highest degree of certainty is required, it is not necessary to state the particular means employed to effect the unlawful acts.

In Coffin v. U. S. 156 U. S. 448, Mr. Justice White, in speaking for the court on this subject, said:

"Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in United States v. Simmons, 96

U. S. 360, 363, as follows: 'Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement.' It is laid down as a general rule that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commision of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. 2 Wharton 1281; United States v. Gooding, 12 Wheat. 460."

How can counsel insist, as they do in their demurrers, that the bill does not show how the acts of the defendants were fraudulent, or how the complainant was injured, when they admit (as distinctly alleged in the bill) that $1,700,000 worth of complainant's timber was unlawfully taken by them and converted to their own use?

Laches: But a single word is necessary relative to this point raised by the defendants in their demurrers. There has been no laches by the government in the prosecution of this case. If there had been, the defense of laches cannot be set up against the government in actions brought to recover for the conversion of its property.

U. S. v. Dallas Military Road Co., 140 U. S., p. 632.

San Pedro &c. Co. v. U. S., 146 U. S. 120.

U. S. v. Bell Tel. Co., 167 U. S. 264.

U. S. v. Nashville &c. Ry. Co., 118 Fed. 125 (Opinion by Mr. Justice Gray.)

For reasons assigned, we ask that the decree of the Court below be reversed, with direction that defendants answer the bill of complaint.

Respectfully,

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M. C. BURCH, Special Assistant Att'y General,
CARL RASCH, U. S. District Attorney,
FRED A. MAYNARD, Special Assistant. U. S. Att'y,

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